

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY LAMONT FENDERSON,

Defendant-Appellant.

UNPUBLISHED

December 23, 2014

No. 319008

Oakland Circuit Court

LC No. 2011-236030-FC

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of a controlled substance causing death, MCL 750.317a, and sentenced to 15 to 30 years in prison. In his prior appeal, we affirmed defendant's conviction but remanded for resentencing, finding that some of the sentencing offense variables (OVs) had been incorrectly scored and the correct scores would alter defendant's minimum sentencing guidelines range. *People v Fenderson*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2012 (Docket No. 306057). On remand, the trial court again sentenced defendant to 15 to 30 years. Defendant now appeals his resentencing and we affirm.

Defendant's original sentencing guidelines range was 135 to 225 months and the trial court imposed a minimum sentence of 180 months (15 years). On first appeal, we concluded that OVs 1, 2, and 14 had been incorrectly scored and that, if scored correctly, defendant's applicable minimum guidelines range would be 108 to 180 months. *Id.*, unpub op at 4-5. On remand, the trial court recalculated defendant's guidelines range at 108 to 180 months, but again imposed a minimum sentence of 180 months.

Defendant contends that the trial court abused its discretion by imposing the same sentence on remand as it had originally imposed, even though the corrected guidelines reduced the sentencing guidelines range. This argument is without merit. MCL 769.34(10) provides that, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Here, the trial court's minimum imposed sentence on remand was within the applicable guidelines range.

Notably, defendant does not argue in this appeal that there were new errors in the scoring of the sentencing guidelines variables.¹ He claims, however, that the trial court failed to consider his accomplishments while in prison and, therefore, relied upon inaccurate information in resentencing him. See *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). The record belies this claim. Indeed, the trial court explicitly noted that it had considered defendant's accomplishments while he was incarcerated. The trial court was not *required* to lessen defendant's minimum sentence based on his conduct while imprisoned.

The trial court's sentence fell within the applicable guidelines range and the court did not sentence defendant based on inaccurate information. Accordingly, we are required to affirm his sentence of 15 to 30 years.

Defendant next argues that he is entitled to resentencing because he was not physically present in the courtroom during the resentencing hearing and was present only by two-way interactive video.² We disagree.

A defendant has a due process right under the US Const, Am XIV, to be present at all critical stages of the proceedings against him. *United States v Gagnon*, 470 US 522, 526; 105 S Ct 1482; 84 L Ed 2d 486 (1985). Michigan courts have found that sentencing is a critical stage of the proceedings at which a defendant is entitled to be present. *People v Palmerton*, 200 Mich App 302, 303; 503 NW2d 663 (1993).

In this case, before the actual resentencing, the prosecution filed several motions for writs to allow defendant to appear for the resentencing hearing via video. Defendant never objected to these writs or stated that he wanted to be physically present in the courtroom for resentencing. Further, at the actual resentencing hearing, defendant did not object on the grounds that he was not physically present in the courtroom. In fact, defense counsel acknowledged that he had spoken with defendant regarding the updates to the presentence report, gone over the guidelines with him, and was willing to proceed in defendant's physical absence.

By not objecting in the months before the resentencing or at the actual resentencing, defendant waived his right to be present in the courtroom. A defendant may waive his right to be present at a critical stage of the proceedings by conduct. *People v Washington*, 461 Mich 294, 298 n 8; 602 NW2d 824 (1999); *People v Swan*, 394 Mich 451; 231 NW2d 651 (1975). A valid waiver of a defendant's presence consists of a specific knowledge of the right and an intentional decision to abandon the protection of the right. *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). Here, defendant knew well in advance of his resentencing hearing that his

¹ Defendant also did not object to the scoring of the guidelines at resentencing.

² This unpreserved claim is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

presence would be by two-way interactive video and neither he nor his counsel ever objected. Thus, defendant waived his right to be physically present in the courtroom.

Defendant also alleges that he had not been allowed to communicate privately with his counsel before resentencing. However, the record is not consistent with this claim. At resentencing, defense counsel told the court that he had the opportunity to discuss the presentence report and guidelines with defendant and answer any questions that he may have had by phone. Accordingly, defendant has failed to establish that his due process rights were violated by appearing at the resentencing via two-way video.

Affirmed.

/s/ Pat M. Donofrio

/s/ Karen Fort Hood

/s/ Douglas B. Shapiro